

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

TABATHA FOSTER,

Plaintiff,

-against-

NEW YORK DAILY NEWS, THOMAS TRACY,  
LARRY McSHANE, JOHN ANNESE, LEONARD  
GREENE, and JOHN MARZULLI,

Defendants.

No. 1:22-cv-02934-LDH-LB

**DECLARATION OF KEVIN  
MACDONALD IN SUPPORT  
OF MOTION TO DISMISS**

KEVIN MACDONALD declares pursuant to 28 U.S.C. §1746 as follows:

1. I am Director of Photography of the New York Daily News (“the Daily News”). I make this Declaration on personal knowledge in support of Defendants’ Motion to Dismiss.
2. On May 6, 2016, the Daily News published an article on its web site with the headline “Brooklyn NYPD chief accused of sleeping with subordinates, including married pregnant women; source denies claims” at the URL <https://www.nydailynews.com/new-york/brooklyn/nypd-chief-investigated-sleeping-subordinates-article-1.2626860> (“the May 6 Article”). A true and correct copy of the May 6 Article is annexed as Exhibit 1.
3. The May 6 Article included an image of a phone screen showing a series of text messages exchanged between Tabatha Foster, the Plaintiff in this action, and NYPD Chief Jeffrey Maddrey. The original version of the text message exchange as obtained by the Daily News also included a photograph of Ms. Foster’s naked buttocks and genital region that she had sent to Chief Maddrey. Prior to publication, the Daily News placed a large black bar over the majority of the image, as can be seen in Exhibit 1.

4. The Daily News did not retain a copy of the original, unedited screen shot showing the image as it appeared before the Daily News added the black bar.

5. On May 7, 2016, the Daily News published an article on its web site with the headline “Former NYPD cop who accused her boss of bedding her and other married, pregnant women refuses to cooperate with probe” at the URL <https://www.nydailynews.com/new-york/ex-nypd-mum-accused-boss-bedding-article-1.2627849> (“the May 7 Article”). A true and correct copy of the May 7 Article is annexed as Exhibit 2.

6. On May 26, 2016, the Daily News published an article on its web site with the headline “Retired NYPD cop sues for \$100M, claims police chief beat her after they had 7 years of trysts” at the URL <https://www.nydailynews.com/new-york/nypd-claims-boss-beat-trysts-files-100m-lawsuit-article-1.2650331> (“the May 26 Article”). A true and correct copy of the May 26 Article is annexed as Exhibit 3.

7. On the same date that it published the May 6 Article, the Daily News also published a news video that covered the same subject matter as the May 6 Article (“the May 6 Video”). The May 6 Video was posted on the Daily News’ YouTube channel, and a prominent link to the May 6 Video was included at the top of the May 6 Article. The May 6 Video can no longer be viewed on the Daily News YouTube channel because it was taken down by YouTube in 2022 in response to a copyright complaint submitted to YouTube by Ms. Foster. A true and correct copy of the May 6 Video is contained on the USB drive submitted herewith as Exhibit 4.

8. On the same date that it published the May 26 Article, the Daily News also published a news video that covered the same subject matter as the May 26 Article (“the May 26 Video”). The May 26 Video was posted on the Daily News’ YouTube channel at <https://www.youtube.com/watch?v=QdeJRNd8344>, and a prominent link to the May 26 Video

was included at the top of the May 26 Article. A true and correct copy of the May 26 Video is contained on the USB drive submitted herewith as Exhibit 5.

9. In April of 2018, the Daily News switched to a new Content Management System (“CMS”) for its website. That change had the unintended effect of removing certain video links from older news stories on the Daily News site. Accordingly, the link to the May 6 Video is no longer present in the May 6 Article, and the link to the May 26 Video is no longer present in the May 26 Article. However, the links to those videos would have been present until April 2018.

10. The link to the May 6 Video can be seen just under the headline in the printout of the original version of the May 6 Article annexed as Exhibit 4 to the Declaration of Matthew A. Leish, submitted herewith. Several frames from the video are visible above a time-stamp showing that the length of the video is 1:14, which is the length of the May 6 Video.

11. As can be seen in Leish Ex. 4, the May 6 Article also originally included three additional images at issue in this lawsuit. Those additional images disappeared from the May 6 Article as a result of the Daily News’ aforementioned switch to a new CMS in April 2018. Each of the images visible in Leish Ex. 4 was present in the May 6 Article until that time.

12. Annexed hereto as Exhibit 6 is a true and correct copy of the version of the May 7 Article that appeared in the print edition of the Daily News, with the headline “Silence, How Odd” and the sub-headline “Chief’s sex accuser goes quiet.”

13. Annexed hereto as Exhibit 7 is a true and correct copy of the version of the May 26 Article that appeared in the print edition of the Daily News, with the headline “NYPD Boss a Bruiser” and the sub-headline “\$100M claim vs. chief after 7 yrs. of trysts.”

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 6, 2023.

  
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KEVIN MACDONALD